Filed 3/30/10 P. v. Luera CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JIMMY LUERA, JR., et al., Defendants and Appellants.	D055681 (Super. Ct. No. RIF113588)

APPEALS from judgments of the Superior Court of Riverside County, Eddie C. Sturgeon, Judge. (Judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Defendants Jimmy Luera, Jr., Omero Carrillo, and Michael Anthony Ortega, Jr. (collectively defendants), who were all members of a criminal street gang known as Westside Riva in the Rubidoux area of Riverside County, separately appeal their convictions of various offenses following their joint jury trial. We conclude the court committed federal constitutional error by failing to sua sponte give CALCRIM No. 220, CALJIC No. 2.90, or an equivalent instruction in its final predeliberation charge to the

jury, and we are not persuaded that the error was harmless beyond a reasonable doubt within the meaning of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) and *People v. Vann* (1974) 12 Cal.3d 220, 228 (*Vann*). Accordingly, we reverse defendants' convictions.

INTRODUCTION

This case arose out of four separate incidents (discussed, *post*) that occurred in October 2003 (victim: Abel Vasquez), November 2003 (victims: Loretta and Jonathan Lamas (together the Lamases)), July 2005 (victim: James Isby), and April 2005 (victims: Michael Clayton and Juan Orosco). Luera was alleged to have acted either alone, or with people other than Carrillo and Ortega, in the first three incidents (victims: Vasquez, the Lamases, and Isby); defendants were alleged to have acted together in the fourth incident (victims: Clayton and Orosco).

The jury convicted Luera, alone, of (1) assault with a deadly weapon (a metal steering wheel locking device called The Club) upon Vasquez (count 1: Pen. Code,[1] § 245, subd. (a)(1) (hereafter section 245(a)(1))), with a true finding that he acted for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b) (hereafter section 186.22(b))); (2) vandalism in an amount exceeding $400 (count 2: § 594, subd. (b)(1)), with a true finding that he acted for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22(b)); (3)

---

1 All further statutory references are to the Penal Code unless otherwise specified.

carrying a loaded firearm, in a vehicle on a public street in a prohibited area of unincorporated territory, while an active participant in a criminal street gang (count 3: §§ 12031, subd. (a)(2)(C), 186.22, subd. (a) (hereafter section 186.22(a))); (4) assault with a semiautomatic firearm on Loretta Lamas (count 4: § 245, subd. (b)); (5) carrying a loaded firearm in a public place, in a vehicle on a public street in a prohibited area of unincorporated territory, where he was not the registered owner of the firearm (count 5: § 12031, subd. (a)(2)(F); and (6) receiving stolen property (a pistol) (*count 16*: § 496, subd. (a)), with a true finding that he acted for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22(b)).

The jury convicted all three defendants of (1) making a threat on April 20, 2005, to commit a crime that would result in death or great bodily injury to Clayton and Orosco (counts 7 & 9, respectively: § 422), with true findings that they acted for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22(b)); and (2) active participation in a criminal street gang (counts 11 (by Carrillo and Ortega on April 20, 2005) & 15 (by Luera on Oct. 19, 2003 through July 22, 2005): § 186.22(a)).

The jury acquitted defendants of count 10 (shooting at an occupied vehicle on April 20, 2005, in violation of § 246) and the lesser included offense of grossly negligent discharge of a firearm (§ 246.3).

The jury hung 11-to-1 in favor of conviction (and 10-to-2 in favor of true findings) on the charges and allegations in counts 6 and 8. Count 6 alleged that defendants

assaulted Clayton with a firearm (§ 245, subd. (a)(2)) on April 20, 2005, and further alleged they committed the offense for the benefit of a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22(b)). Count 8 alleged the same crime on the same date, with the same enhancement allegation, naming Orosco as the victim. Finding the jury hopelessly deadlocked, the court declared a mistrial as to these counts.

In a bifurcated proceeding, the court found true the count 16 allegation that Luera committed the offense while released on bail (§ 12022.1).

The court sentenced Luera to a total prison term of 22 years 4 months. The court sentenced Carrillo and Ortega each to a total term of 11 years.

A. *Contentions*

Defendants assert more than 20 contentions. In light of our determination that the dispositive contention is that the court committed reversible federal constitutional error by failing to sua sponte give CALCRIM No. 220, CALJIC No. 2.90, or an equivalent instruction in its final predeliberation charge to the jury, we need not reach the remaining contentions.

1. *Luera's contentions*

Luera contends (1) the judgment must be reversed as to count 1 (assault on Vasquez with a deadly weapon) because Detective Harris's testimony that others told him Luera hit Vasquez with the Club was inadmissible hearsay and violated Luera's Sixth Amendment right to confront witnesses against him; (2) the judgment must be reversed as to count 4 (assault on Loretta Lamas with a semiautomatic firearm) because no

substantial evidence shows the firearm he pointed in Lamas's direction was semiautomatic or loaded; (3) the judgment must be reversed as to count 3 (carrying a loaded firearm in a vehicle on a public street in an incorporated city or a prohibited area of unincorporated territory, while an active participant in a criminal street gang) and count 5 (carrying a loaded firearm in a public place, in a vehicle on a public street in an incorporated city or a prohibited area of unincorporated territory, when he was not the registered owner of the firearm) because the court failed to sua sponte instruct the jury on any of the elements of the offenses, thereby violating Luera's federal constitutional rights to due process and a jury trial; (4) the judgment must also be reversed as to counts 3 and 5 because no substantial evidence shows he carried a loaded firearm in a public place in an incorporated city or a prohibited area in unincorporated territory; (5) the judgment must be reversed as to counts 7 and 9 (making a threat to commit a crime that would result in death or great bodily injury to Clayton and Orosco, respectively) because no substantial evidence shows he uttered the threat or aided the person (Carrillo) who did; (6) the judgment must be reversed as to count 9 (making a criminal threat against Orosco) because no substantial evidence shows Orosco heard Carrillo's threat; (7) the judgment must be reversed as to count 16 (receiving stolen property, Richard Casiano's handgun) because no substantial evidence shows he possessed Casiano's gun or knew it was stolen; (8) the judgment must be reversed as to *all counts* because the court failed to instruct the jury on the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt; (9) the judgment must be reversed as to count 4 (assault on Loretta Lamas with a semiautomatic firearm) because the court failed to instruct the jury

that the nature of the firearm as a semiautomatic is an element of the offense that must be proved beyond a reasonable doubt and also failed to instruct on the definition of "semiautomatic"; (10) the judgment must be reversed as to count 4 because the court failed to instruct the jury on the lesser, necessarily included offense of assault with a firearm (§ 245, subd. (a)(2)); (11) the judgment must be reversed as to counts 7 and 9 (making criminal threats against Clayton and Orosco, respectively) because the court erroneously instructed the jury under CALJIC No. 254 that the prosecution was not required to prove any intent, thereby removing from the jury, as an element of this section 422 offense, the intent that the alleged threat be taken as a criminal threat; (12) the judgment must be reversed as to count 16 (receiving stolen property, Richard Casiano's handgun) because the court never instructed the jury on the definitions of "stolen," "theft," or "burglary"; and thus it failed to sua sponte instruct the jury on all of the elements of receiving stolen property, and broadened the definition of the offense beyond its statutory limits, such that it violated Luera's federal constitutional rights to due process and a jury trial; (13) the judgment must be reversed as to count 3 (carrying a loaded firearm in a vehicle on a public street in an incorporated city or a prohibited area of unincorporated territory, while an active participant in a criminal street gang), count 15 (active participation in a criminal street gang), and the section 186.22(b) gang enhancement allegations because the court erroneously instructed the jury that two elements of these offenses and allegations (i.e., that Westside Riva engaged in a pattern of criminal activity and that it had as one of its primary activities the commission of enumerated offenses) need only be proven by a preponderance of the evidence; (14) the

sentence on either count 3 or count 5 must be stayed under section 654 because no substantial evidence shows that these firearm offenses were committed with independent objectives or that they were not committed as part of an indivisible course of conduct; (15) the matter should be remanded for resentencing because the court abused its discretion in sentencing Luera to consecutive terms on count 1 (assault on Vasquez with a deadly weapon) and count 2 (vandalism of Vasquez's car) as the evidence shows that both offenses occurred at the same time, in the same place, against the same person, with the use of the same Club in a single attack, and with the same objective of benefiting Westside Riva; (16) the judgment must be reversed as to counts 3 and 5 because (a) "[i]t is not clear whether the firearm in question was the one [Luera] pointed in Lamas' direction or the one [Detective] Harris found in [a purse belonging to Sarah Arrellano, Luera's wife]," (b) "the prosecution did not elect which act constituted the offense in either [count 3 or count 5]," and (c) the court prejudicially erred by failing to sua sopnte instruct the jury that it must unanimously agree on the act constituting each offense; and (17) the judgment must be reversed as to counts 3 and 5 because section 12031 violates the Second Amendment to the federal Constitution and is unconstitutionally overbroad since it criminalizes conduct protected by the Second Amendment.

2. *Carrillo's contentions*

Carrillo contends (1) the judgment must be reversed as to counts 7, 9 and 11 because the court erroneously denied his motion for an evidentiary hearing, outside the presence of the jury, to determine the admissibility of the testimony of the prosecution's

gang expert; and (2) the judgment also must be reversed as to counts 7, 9 and 11 because the court erroneously denied his motion to sever his trial from Luera's.

Carrillo also contends, as does Luera, that (3) the judgment must be reversed as to count 9 because no substantial evidence shows Orosco heard Carrillo's threat; (4) the judgment must be reversed as to all counts because the court failed to instruct the jury on the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt; (5) the judgment must be reversed as to counts 7 and 9 because the court erroneously instructed the jury that the prosecution was not required to prove any mental state, thereby removing from the jury, as an element of this section 422 offense, the intent that the alleged threat be taken as a criminal threat; and (6) the judgment must be reversed as to counts 7 and 9 and the section 186.22(b) gang enhancement allegations because the court erroneously instructed the jury that two elements of these offenses and allegations (i.e., that Westside Riva engaged in a pattern of criminal activity and that it had as one of its primary activities the commission of enumerated offenses) need only be proven by a preponderance of the evidence, thereby violating Carrillo's federal constitutional rights to due process and a jury trial.

3. *Ortega's contentions*

Ortega contends (as do Luera and Carrillo) that (1) the judgment against him must be reversed because the court failed to instruct the jury on the presumption of innocence, the burden of proof, and the standard of proof beyond a reasonable doubt; (2) the judgment must be reversed as to counts 7 and 9 (making a criminal threat against Clayton and Orosco, respectively, in violation of § 422) because the court erroneously instructed

the jury that the prosecution was not required to prove any mental state; (3) the judgment must be reversed as to count 9 because no substantial evidence shows Orosco heard Carrillo's threat.

Ortega also contends (as does Carrillo) that (4) the judgment against him must be reversed because the court erroneously denied his motion to sever his trial from Luera's.

Ortega further contends that (5) the court erroneously allowed the prosecution's gang expert to give opinion testimony regarding his (Ortega's) subjective intent; and (6) the cumulative effect of the foregoing claimed errors deprived him of a fair trial under the due process clauses of the state and federal Constitutions.

FACTUAL BACKGROUND

A. *The People's Case*

1. *Alleged crimes involving Luera alone*

a. *October 2003 attack on Abel Vasquez* (*counts 1, 2 & 15*)

Through an interpreter, Abel Vasquez reluctantly testified under subpoena that on October 19, 2003, he stopped at a red light at the intersection of Mission Boulevard and Rubidoux Boulevard in Riverside County while driving to Colton. Using his rearview mirror, Vasquez saw that Luera, a female, and three other males were in a green car behind him, staring at him. Luera and another person got out of their car and used The Club (hereafter referred to as the Club) to break the windshield and the windows of the rear doors of Vasquez's car; and Luera punched Vasquez in the face with his fists, breaking his nose. Luera and the assailant got back in their green car, and the female, who had moved into the driver's seat, drove them away.

Joe Luna witnessed the attack from his car from about 100 feet away. He saw three Hispanic men get out of a car at the intersection of Mission and Rubidoux, two of whom attacked and broke windows of the car in front of them. One of them attacked the driver. When the men returned to their car and left, a female was driving. Luna followed the car to the freeway and wrote down the license plate number.

Although Vasquez testified that Luera had used his fists to hit him, Detective Curt Harris of the Riverside County Sheriff's Department testified that he spoke with Vasquez through Vasquez's bilingual sister-in-law, who provided translation, and Vasquez indicated that Luera assaulted him with a metal rod. Detective Harris stated that Vasquez had injuries on his face that were consistent with such an assault.

b. *November 2003 attack on Loretta and Jonathan Lamas* (*counts 3, 4, 5 & 15*)

Loretta Lamas reluctantly testified under subpoena that at about 8:35 p.m. on November 21, 2003, she stopped her car at a red light behind a teal Honda Accord in the Rubidoux area after she picked up her son, Jonathan Lamas, from work to take him to their home, which was also in the Rubidoux area. At that time she was aware of gang activity in the Rubidoux area. The male driver of the Accord, whom she said she could not identify at trial, angrily leaned out the door while yelling, pointed a black pistol at them, and cocked it. Eventually he got back in the Accord and drove away.

Loretta Lamas stated she memorized the license plate number of the Accord, called the police, and gave it to them along with a description of the man in the Accord. From a photographic lineup, both Loretta Lamas and Johnathan Lamas identified Luera as the man who pointed the gun.

Detective Harris indicated that the description of the Accord in the Lamas incident matched that of the vehicle involved in the earlier Vasquez incident and led him to believe that Luera might be involved. Detective Harris participated in separately giving the same photo lineup to Loretta and Jonathan Lamas and was present when they identified Luera. Loretta Lamas signed the preprinted admonition given prior to the lineups.

Detective Harris stated he and another deputy identified and then went to the house where the registered owner of the green Accord resided. There, he met with Maria Villalpando, the mother of Sarah Arrellano, and later spotted the Accord pulling into a driveway on Rathke, a street in the Rubidoux area about 1.5 miles west of where the Lamas incident occurred. Luera was driving the Accord, and Sarah Arrellano, his wife, was his passenger. Detective Harris and his partner turned on the emergency lights and spotlights on their vehicles and ordered Luera and Arrellano to exit the Accord. Detective Harris and another deputy searched the car and found a loaded black semiautomatic handgun in Arrellano's purse, which had been shoved under the front passenger seat. Detective Harris advised Luera of his *Miranda* rights.[2] Luera agreed to speak with Detective Harris and denied any involvement in the Lamas incident.

c. *July 2005 attack on James Isby and discovery of stolen gun* (*counts 12-16*)

James Isby, who at the time of trial in this matter was serving time in prison for receiving stolen property, testified while shackled that he knew Luera as "Youngster."

---

2 *Miranda v. Arizona* (1966) 384 U.S. 436.

On July 22, 2005, Isby was in an alley near Mennes, in the Rubidoux area, when a blue Dodge Neon rolled past him, then circled around, came back and stopped about 40 or 50 feet away. Several people were in the car. Someone got out of the rear passenger-side door, walked toward Isby, asked where he was from, and fired several shots at him with a small revolver. Isby ran into a furniture store to hide.

On direct examination, Isby identified Luera as the shooter. On cross-examination, Isby indicated the incident lasted about 10 seconds, he did not recognize Luera at the time of the shooting because "it all happened real fast," he had had only brief contact with Luera about a month before the shooting, and he did not get a good look at the shooter. Isby stated he phoned a friend and described the shooter's car and clothing (black "south shorts" and black socks, "colors" that Youngster was known to wear) and learned from his friend that Youngster was the shooter.

On redirect examination, Isby testified that he spoke with Detective Harris about 10 or 15 minutes after the shooting and told him that Youngster had shot at him. Isby also stated he told Detective Harris that when Youngster got out of the car, he yelled "Westside Riva" at him.

Ricardo Arrellano, who lived in Corona in Riverside County, testified that Sarah Arrellano is his daughter, Luera is his son-in-law, Sarah and Luera lived with him in Corona in 2005, and at that time Sarah owned a blue Dodge Neon.

Detective Harris testified that he investigated the Isby shooting incident. At the time of the shooting, Isby was not an active member of the Westside Project Crips, but he was still associated with them. Detective Harris was familiar at that time with a gang war

that was going on in the area. On the day of the shooting, Isby called Detective Harris and reported in a frightened voice that a blue Dodge Neon with three Hispanic males inside had driven by him, one of them jumped out of the car, asked where he was from, yelled "Westside Riva," and shot at him. Isby told Detective Harris that he had met with Luera after the shooting to set the record straight that he was not involved in any of the gang violence in the Rubidoux area, he did not want to harm anybody in the Westside Riva gang, and he did not want to be a victim of that gang.

After interviewing Isby, Detective Harris decided to arrest Luera. Detective Harris and Detective Gary Bowen continued their investigation. Eventually, on August 24, 2005, they went to the house in Corona where Luera lived with Sarah Arrellano and her parents. When they pulled up to the home, the detectives saw a blue Dodge Neon parked in the driveway. Luera was inside the car. The detectives obtained permission to search the home and found a black, loaded semiautomatic handgun hidden behind a mirror leaning against the wall just outside Luera and Sarah Arrellano's bedroom. This handgun was stolen from Richard Casiano during a residential burglary in 1997.

d. *Stipulation* (*counts 15 & 16*)

The parties stipulated that Luera was not legally allowed to possess any firearm as of October 19, 2003, and he had not been allowed to do so at any time since that date.

2. *Attack by all three defendants on Clayton and Orosco* (*counts 6-11 & 15*)

Michael Clayton, who at the time of trial in this matter was serving time in prison for a robbery conviction, testified that on the night of April 20, 2005, he was a passenger in a car his friend Juan Orosco was driving in the Rubidoux area. They were driving to

Little Park, in the Rubidoux area, to look for Clayton's cousin. Clayton saw a group of four Hispanic males standing in the street. One was wearing a gray hooded sweatshirt and glasses. As they waited at the park, a fairly new black Saturn with chrome rims pulled alongside them, facing in the opposite direction.

One of the occupants in the Saturn was the male with the hooded sweatshirt and glasses. Clayton first testified that the male with the hooded sweatshirt asked him, "Where you from?" and "What set you claim?" He later indicated he did not recall who in the Saturn asked that question. Clayton, who was familiar with the gangs and their activity in the Rubidoux area, interpreted the question to mean, "What gang are you from?" One of the males in the black car said, "This is Westside Riva." Based on his experience in the Rubidoux area, Clayton knew that Westside Riva was a prominent Hispanic gang and that there was an ongoing conflict there between Westside Riva and the Westside PJ Crops, an African-American gang. Someone in the Saturn also said, "Don't move," and "You're going to get shot [if you move]."

Clayton testified that when he and Orosco saw one of the males in the Saturn reach under a seat, he told Orosco, "Take off." Clayton believed they were in danger for associating with one another because he is Black and Orosco is Hispanic. Orosco drove them away as fast as his car would go. The Saturn chased them, initially with its lights on, and then with its lights off. A couple of times the Saturn pulled alongside them, both on the left and on the right, and Clayton was afraid he and Orosco would get shot.

Clayton saw arms protruding from windows of the Saturn and heard five or six gunshots coming from that car. He and Orosco ducked down in their seats to avoid

getting shot and kept driving. The chase continued for two or three miles. Orosco tried to turn into a gas station, but lost control of his car and hit a curb. Clayton and Orosco ran into the gas station and asked the clerk to call 911. As they ran inside, the black Saturn drove by again with someone inside yelling, "Westside" and then drove away back toward where the chase started.

Riverside County Sheriff's Department Detective Brett Johnson testified that Clayton flagged him down near the gas station. Clayton, who appeared very frightened and was out of breath, said Westside Riva had just shot at him. Detective Johnson separately interviewed both Clayton and Orosco. Based upon what they told him, Detective Johnson put out a dispatch to be on the lookout for a black Saturn or Nissan with four Hispanic male passengers.

California Highway Patrol Officer Frederick Langley, who was on patrol with his partner that night, testified he received a dispatch advising there had been a shooting incident and to be on the lookout for a black car, possibly a Nissan Altima with four occupants including one wearing glasses and a gray hooded sweatshirt, who was believed to be the shooter. Almost immediately, Officer Langley, who was eastbound on Mission Boulevard in the left-turn pocket at Rubidoux Boulevard, saw a black four-door vehicle driving northbound on Rubidoux Boulevard and making a making a left turn through the intersection directly ahead of him. He could see the car had four occupants, and the left rear passenger seemed to match the description of the person with a gray, hooded sweatshirt and glasses. Officer Langley stopped the black car and removed and detained the four suspects until Detective Johnson and other law enforcement officers arrived.

Detective Johnson indicated at trial that when he reached the scene at Rubidoux Boulevard and Mission Boulevard, he saw the four detained males, including Luera, Carrillo, and Ortega, whom he recognized, and a fourth male, Mario Soto, whom he did not recognize. Detective Johnson interviewed all three defendants and Soto at the scene. Detective Johnson brought Clayton and Orosco to the scene of the detention to see whether they could identify any of the suspects.

Detective Johnson determined that Ortega was the driver of the black car, which belonged to his parents. Carrillo, who was wearing glasses and a hooded gray sweatshirt, was the rear driver's-side passenger. Defendants all denied involvement in the shooting. Clayton identified Carrillo, who had pulled the hood over his head, as the one with the hooded gray sweatshirt and glasses. Carrillo told Detective Johnson that he had been with Luera, Ortega and Soto all night.

At trial, Clayton was able to identify Luera as one of the males in the Saturn. Clayton indicated he saw Luera in the front of the Saturn.

3. *Gang expert testimony*

According to Riverside County Sheriff's Department Detective Nathan Padilla, a gang expert who worked in a "gang capacity" in the Rubidoux area between 2002 and 2007, there are two Hispanic street gangs and one African-American street gang in the Rubidoux area. A street gang is an ongoing organization or three or more individuals who share a common sign or symbol and participate in a criminal activity. The street gangs interact with violence and have conflicts over territory. The members of the gangs

equate respect with fear, and fear benefits the gangs by dissuading the reporting of crimes.

The African-American street gang is known as the Westside Project Crips. That gang is also known as Westside PJ.

One of the two Hispanic street gangs is known as Dogstown Riva, an up-and-coming gang that splintered from the Los Angeles area. The other Hispanic gang is known as Westside Riva. In October 2003 Westside Riva was an active, ongoing criminal street gang that had about 200 active members and 100 associates. Westside Riva's primary activities were homicides, serious assaults, drive-by shootings, carjackings, drug distribution and sales, mail theft, and extortion.

Detective Padilla opined that in April 2005 Luera was a self-admitted Westside Riva member whose moniker was "Youngster." Luera was a "shot caller," which in the ranks of a gang is a senior member who gives orders. Carrillo was a self-admitted Westside Riva member whose moniker was "Cyclone," and Ortega was a self-admitted Westside Riva member whose moniker was "Spanky."

Detective Padilla described photographic exhibits that showed Luera throwing Westside Riva handsigns, such as the letter "W," which signifies Westside Riva, and "D," which signifies Demonios, a clique within Westside Riva; graffiti in the names of "Youngster" and "Cyclone"; Luera with Zeke Prado, a Westside Riva member known as "Asesino," with the Polaroid photograph also showing the numbers "187," a reference to the Penal Code that means "I'm going to kill you" or "[i]f you're seen, you're going to be killed"; the number "13" in graffiti, which signifies control by the Mexican Mafia

because "M" is the 13th letter of the alphabet; Luera holding a "WSR" sweatshirt and flashing a "W" handsign for Westside Riva; and Ortega posing with other Westside Riva gang members.

Detective Padilla testified he was familiar with Luera's actions on October 19, 2003, "regarding an attack on Abel Vasquez" because he (Detective Padilla) assisted in identifying Luera based on a license plate number that was provided, and he read the reports in the case. He opined that Luera was an active Westside Riva member on that date.

On direct examination, the prosecutor gave Detective Padilla the hypothetical situation of two vehicles driving down Mission Boulevard and stopping at the intersection of Rubidoux Boulevard and Mission Boulevard. One of the vehicles has two or three Westside Riva gang members and a girlfriend of one of those members; the other car has an unfamiliar Hispanic male. Two of the Westside Riva gang members get out with metal clubs, walk up to the unfamiliar Hispanic, break the windows of his car, and beat him with the clubs and their hands. Based on that hypothetical, Detective Padilla opined that such gang members, by breaking the glass and beating the victim, would be intending to benefit the gang.

Detective Padilla opined that when gangs that are fighting against each other identify themselves by race, all members of the opposing gang's race are potential targets. The process starts with gangs in the prisons and trickles down to the street. When the prison gang members are paroled, they must abide by certain guidelines and must not associate or interact with a person of the opposite race, especially an active gang member

of the opposite race. Little Park, where the Clayton and Orosco incident (discussed, *ante*) occurred, is Westside Riva territory, and the gang typically has members posted there as lookouts "watching their turf."

Detective Padilla testified he was aware of the facts of the April 20, 2005 incident involving Clayton and Orosco in Little Park in which the male with the hooded sweatshirt asked, "Where you from?" The question "Where you from?" means "What gang are you from?" There is no right answer that one could give to that question to avoid being attacked. The responding person will be dealt with either as an enemy gang member or, if he's not a gang member, as a victim.

The prosecutor gave Detective Padilla the hypothetical situation of a non-gang-member African-American driving with a non-gang-member Hispanic through Little Park. They are approached by a car full of Westside Riva members and one of the Westside Riva members rolls down the car window and says to the African-American, "Where you from?" Detective Padilla opined that such a non-gang-member African-American confronted with this question from a Westside Riva member would be in a no-win situation. If he answered, "Crip," he would be an enemy even if he was not a member of Westside PJ and would be attacked. If he answered "Westside Riva," he would be attacked. If he denied any gang affiliation, he would be attacked. Detective Padilla indicated that the statement, "This is Westside Riva," means that the person to whom it is directed is in Westside Riva's turf; it is an immediate challenge.

In this hypothetical situation, if somebody else from the Westside Riva car added, "Don't move" and "[y]ou'll get shot," Detective Padilla also opined over defense

objections that all of the gang members in the Westside Riva car would be intending to threaten the African-American and Hispanic males and would also be intending to benefit the Westside Riva gang. By acting with other gang members as witnesses, their status in the gang would increase because their fellow gang members could vouch for their actions. The member making the threat would be helping the gang by showing he was "down" for the gang, meaning willing to make the initial contact. The driver would be helping the gang by getting the others away if they needed to get away. Others in the car, even if they did nothing, would be adding numbers, and therefore fearsomeness, to the threat.

Detective Padilla indicated that "hitting someone up" is the general introduction used in the gang culture. "Where you from?" is an example of "hitting someone up." An entire group can "hit someone up," and a group will often agree beforehand on a hit-up. "Hitting someone up" often results in violence, and gang members are generally aware of this.

When asked whether the hypothetical gang members would be intending to confront both the African-American and Hispanic non-gang members, Detective Padilla opined they would.

When asked whether all of the hypothetical gang members in the Westside Riva car would be intending to benefit their gang if they chased the victims' car as they tried to get away, Detective Padilla opined they would because they would be chasing the non-gang members away from Westside Riva turf.

When asked whether firing shots at the victim's car during such a chase would have any significance, Detective Padilla opined it would because the Westside Riva members would be sending the message, "We'll kill you" and "We got guns."

Detective Padilla opined that Ortega, Carrillo, and Luera were active members of Westside Riva on April 20, 2005; the man in the gray sweatshirt who "hit up" Clayton and Orosco benefited Westside Riva; and hypothetically assuming Carrillo had moved away from Riverside and was living in Fresno, Carrillo's actions in the Westside Riva car benefited Westside Riva by showing his allegiance to the gang and instilling fear in the victims to make them hesitant to call law enforcement.

According to Detective Padilla, gang members commonly discard guns after they use them because they can easily replace the guns either by stealing them or by stealing something else and exchanging it for a gun. In the hypothetical situation presented by the prosecutor, Detective Padilla stated his opinion about the case would not be impacted if the Westside Riva car was stopped and no guns were found in the car.

4. *Predicate crimes*

Riverside County Sheriff's Department Detective Philip Matheny testified that on June 1, 2005, he was involved in stopping Ortega, who was driving a stolen car in the Rubidoux area. Ortega's girlfriend was with him in the car. Based on his training, Detective Matheny stated that a stolen car can be started without a key by punching out the ignition switch by force and turning the tumblers by inserting some type of instrument such as a screwdriver. On this occasion, Detective Matheny found a screwdriver inserted

into the ignition switch of the car Ortega was driving. A search of the car revealed a loaded gun underneath the front passenger seat.

Daniel Martinez, a convicted felon who at the time of trial had lived in the Rubidoux community for about 17 years, testified he was familiar with the Westside Riva gang and the gang activity there. Martinez stated he had heard of the term "snitch," and he was afraid the Westside Riva gang might retaliate against him and his family. One of his two younger brothers had been a member of Westside Riva, and his other brother, although not a member, had been associated with that gang. Martinez had heard of a Westside Riva gang member named "Youngster,"and he identified Luera as Youngster.

Martinez stated that, on July 30, 2005, at around 1:00 a.m., as he was driving a Ford Explorer near the intersection of 42nd and Riverview in the Rubidoux area, he stopped at a traffic signal. Youngster (Luera) and another Westside Riva gangster named "Nemo" approached Martinez, Nemo put a gun to his head, and Youngster came in through the passenger side and pushed Martinez out of the vehicle. Luera took Martinez's wallet and some other personal items, and then he and Nemo drove away in Martinez's Explorer.

The court took judicial notice of three cases involving Westside Riva members. One was a 2002 carjacking by three members in which the victim was badly beaten; another was a 2003 staged carjacking by Carrillo and another Westside Riva member, Zeke Prado ("Asesino"), in which Carrillo's role was to point the gun; and the third involved a 2004 shooting by Westside Riva members at a house that belonged to members of rival gang, Dogstown Riva.

B. *Defense Cases*

None of the defendants testified. Only Carrillo presented defense evidence. His sole witness was Carrillo's fiancé, who testified that Carrillo moved in with her in Fresno in February 2005. Carrillo worked in construction there.

DISCUSSION

I

INSTRUCTIONAL ERROR (*ALL COUNTS*)

Defendants all contend their convictions must be reversed as to all counts because the trial court failed to give in its predeliberation charge to the jury a standard instruction on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt (with, e.g., CALCRIM No. 220 or CALJIC No. 2.90). Specifically, they contend the court committed federal constitutional error by failing to sua sponte give such an instruction and that federal constitutional error was a structural defect in the trial that requires reversal per se of all of their convictions. Alternatively, they contend that even if the court's instructional error was not structural, it violated their federal constitutional rights and was not harmless beyond a reasonable doubt under the standard of prejudice announced in *Chapman*, *supra*, 386 U.S. at page 24.

The People disagree, claiming the instructions given by the court both before and after the close of evidence adequately told the jury that the People had the burden of proving each element of every charged offense beyond a reasonable doubt, and thus the court's omission of a predeliberation instruction with CALCRIM No. 220 (or CALJIC No. 2.90) was not federal constitutional error.

We conclude the court committed federal constitutional error by failing to sua sponte give CALCRIM No. 220, CALJIC No. 2.90, or an equivalent instruction in its final predeliberation charge to the jury, and we are not persuaded that that error was harmless beyond a reasonable doubt within the meaning of *Chapman*, *supra*, 386 U.S. 18, 24, and *Vann*, *supra*, 12 Cal.3d at p. 228. We therefore reverse defendants' convictions.

A. *Background*

1. *Jury instructions given during jury selection*

On October 2, 2007,[3] during the first day of voir dire (or jury selection), the trial court instructed the first jury panel of 24 prospective jurors with a modified version of CALCRIM No. 220 (2006 rev.)[4] on the presumption of innocence and the beyond-a-

---

3 All further dates refer to calendar year 2007 unless otherwise specified.

4 CALCRIM No. 220 (2006 rev.) states in full: "The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial. [¶] *A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt.* Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. [¶] *Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.* [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty." (Italics added.)

reasonable-doubt standard of proof.[5] On October 11, during the fifth day of voir dire, the court again instructed the 15 continuing panel members and a second panel of prospective jurors with a similarly modified version of CALCRIM No. 220.[6] Although all panel members ultimately selected as jurors apparently were present during that instruction, they had yet to be empanelled or sworn by the court clerk. Later that day, the jury selection was completed.

Four days later, on October 15, the panel members selected for the jury and the three alternates were sworn by the clerk, and the prosecution's first witnesses testified.

---

5 The court stated: "[I]n a criminal case, a defendant is presumed to be innocent. This presumption requires that the People prove each element of the crime and any specific allegation beyond a reasonable doubt. And until and unless this is done, the presumption of innocence prevails. [¶] Beyond a reasonable doubt is defined as follows: It is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt."

6 The court's instruction, which was virtually identical to the one quoted in footnote 5, *ante*, stated: "In a criminal case, the defendants are presumed to be innocent. This presumption requires the People to prove each element of the crime and each allegation beyond a reasonable doubt. Until and unless this is done, the presumption of innocence prevails. [¶] Proof beyond a reasonable doubt is defined as follows: It is proof that leaves you with an abiding conviction that the charge is true. The evidence must not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt."

The trial court did not instruct the jurors with CALCRIM No. 220 or CALJIC No. 2.90[7] at any time after their empanelment.

2. *Limiting instructions given to the jury during the People's case-in-chief*

On October 17, as Detective Philip Matheny of the Riverside County Sheriff's Department was about to testify, the court gave the jury a limiting instruction regarding the jury's consideration of evidence the prosecution had presented showing that Ortega had committed uncharged offenses of unlawfully possessing a weapon and a stolen vehicle. In the course of giving this limiting instruction, the court instructed the jury that, "[i]f you conclude that the named defendant committed the uncharged offense, that conclusion is only one factor to consider along with all other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged offense. *The People must still prove each element of every charge beyond a reasonable doubt*." (Italics added.)

Later that day, as Martinez was about to testify about the July 30, 2005 incident involving Luera, the court again interrupted the People's presentation of evidence to give the jury a limiting instruction regarding the consideration of evidence the prosecution had presented showing that Luera had committed the uncharged offenses of robbery and

---

7 CALJIC No. 2.90 (Fall 2009 ed.) states: "*A defendant in a criminal action is presumed to be innocent until the contrary is proved*, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. *This presumption places upon the People the burden of proving* [*him*] [*her*] *guilty beyond a reasonable doubt.* [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (Italics added.)

carjacking. In the course of giving this limiting instruction, the court again instructed the jury that, "[i]f you conclude that the named defendant committed the uncharged offenses, that conclusion is only one factor to consider [along] with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged offenses. *The People must still prove each element of every charge beyond a reasonable doubt*." (Italics added.)

On October 19, after Detective Padilla, the People's gang expert, gave his expert opinion testimony, the court gave two more limiting instructions: one regarding the jury's consideration of hearsay information upon which Detective Padilla relied in formulating his expert opinions and another regarding the jury's consideration of evidence the prosecution had presented showing that Carrillo had committed the uncharged offense of carjacking. In the course of giving the latter limiting instruction, the court again instructed the jury that, "[i]f you conclude that the named defendant committed the uncharged offense, that conclusion is only one factor to consider along with the other evidence. [¶] It is not sufficient by itself to prove that the defendant is guilty of the charged offenses. *The People must still prove every element of each charge beyond a reasonable doubt*." (Italics added.)

3. *Predeliberation jury instructions*

On October 23, after the close of evidence and before counsels' closing arguments, the trial court gave its predeliberation instructions to the jury, but omitted an instruction with either CALCRIM No. 220 or CALJIC No. 2.90 on the presumption of innocence and the beyond-a-reasonable-doubt standard of proof.

The court instructed the jury with CALCRIM No. 200 that it would "now instruct . . . on the law that applies to this case," it would "give . . . a copy of the instructions to use in the jury room," the jury "must follow the law as I explain it to you," and "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

The court instructed with CALCRIM No. 224 on sufficiency of circumstantial evidence, stating in part:

> "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that *the People have proved each fact essential to that conclusion beyond a reasonable doubt*." (Italics added.)

The court also instructed with CALCRIM No. 225 on circumstantial evidence of intent or mental state, again stating in part:

> "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that *the People have proved each fact essential to that conclusion beyond a reasonable doubt*." (Italics added.)

The court also instructed with CALCRIM No. 315 on eyewitness identification, stating in part:

> "*The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime*. If the People have not met this burden, you must find the defendant not guilty." (Italics added.)

The court instructed with CALCRIM No. 359 on the corpus delicti rule, stating in part:

> "The defendant may not be convicted of any crime based on his out-of-court statements alone. . . . [¶] . . . [¶] *You may not convict the*

> *defendant unless the People have proved* [*his*] *guilt beyond a reasonable doubt*." (Italics added.)

The court instructed with CALCRIM No. 375 on evidence of uncharged offenses to be considered for the limited purpose of deciding whether Luera, Carrillo or Ortega committed any such offenses and, if they did, whether any of them acted with intent to benefit Westside Riva, had a motive to commit the offenses alleged in this case, or knew that Westside Riva was a criminal street gang. In giving that instruction, the court stated in part:

> "If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged offenses. *The People must still prove every element of each charge beyond a reasonable doubt*." (Italics added.)

In more specific contexts, regarding particular allegations, the court repeatedly instructed on the People's beyond-a-reasonable-doubt burden of proof regarding those allegations. For example, the court instructed the jury with CALCRIM No. 2542 that, if it found Luera guilty of unlawfully carrying a concealed firearm within a vehicle or causing a firearm to be concealed within a vehicle as alleged in count 3, it must then decide whether the People had proved the additional allegation that he was an active participant in a criminal street gang. The court also stated in part:

> "*The People have the burden of proving this allegation beyond a reasonable doubt*. If the People have not met this burden, you must find that this *allegation* has not been proved." (Italics added.)

The court instructed the jury with CALCRIM No. 2545 that, if it found Luera guilty of unlawfully carrying a loaded firearm, as alleged in count 5, it must then decide

whether the People had proved the additional allegation that he was not the registered owner of the firearm. The court again instructed the jury on the People's beyond-a-reasonable-doubt burden of proof, stating:

> "*The People have the burden of proving this allegation beyond a reasonable doubt*. If the People have not met this burden, you must find this *allegation* has not been proved." (Italics added.)

The court also instructed with CALCRIM No. 601 that, if the jury found Luera guilty of attempting to murder James Isby, as alleged in count 12, it must then decide whether the People had proved the additional allegation that he committed the offense willfully and with deliberation and premeditation. The court again stated in part:

> "*The People have the burden of proving this allegation beyond a reasonable doubt*. If the People have not met this burden, you must find this *allegation* has not been proved." (Italics added.)

The court next instructed the jury with CALCRIM No. 3148 that if it found Luera guilty of the crime charged in count 12 (discussed, *ante*), it must then decide whether the People had proved the additional allegation that he personally and intentionally discharged a firearm during that offense. The court once again stated in part:

> "*The People have the burden of proving this allegation beyond a reasonable doubt*. If the People have not met this burden, you must find this *allegation* has not been proved." (Italics added.)

The court later instructed with CALCRIM No. 1401 that, if the jury found Luera, Carrillo or Ortega guilty of the crimes charged in counts 1, 2, 6-10, 12-14 and 16, or the lesser included offenses of those crimes, it must then decide whether the People had proved for each crime the additional allegation that the defendant committed the crime

for the benefit of, at the direction of or in association with a criminal street gang. The court again stated in part:

> "*The People have the burden of proving this allegation beyond a reasonable doubt*. If the People have not met this burden, you must find that the *allegation* has not been proved." (Italics added.)

However, the court did not instruct, either orally or in writing, with CALCRIM No. 220 or CALJIC No. 2.90 on the presumption of defendants' innocence or the prosecution's burden to prove their guilt beyond a reasonable doubt.

4. *Closing arguments*

In their arguments to the jury, all of the attorneys acknowledged both the allocation to the People of the burden of proof and the beyond-a-reasonable-doubt standard of proof. In his closing argument, the prosecutor—using a projector to display information not identified in the record and apparently referring to the People's burden of proof—stated that "[i]t's not beyond all possible doubt" and "it's beyond a reasonable doubt."

In his closing argument, Luera's counsel stated that the "[p]rosecution has the burden of proving each count beyond a reasonable doubt." Ortega's counsel reminded the jury that "[t]he burden is beyond a reasonable doubt." Carrillo's counsel also referred to the beyond-a-reasonable-doubt standard of proof when he argued that although Clayton said he heard gunshots, "without something . . . to corroborate that, that is not proven beyond a reasonable doubt."

B. *Applicable Legal Principles*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause [of the Fifth Amendment of the United States Constitution]. The prosecution bears the burden of proving all elements of the offense charged [citations], and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements [citations]. This beyond-a-reasonable-doubt requirement . . . applies in state as well as federal proceedings." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 (*Sullivan*).)

In *Sullivan*, the United States Supreme Court explained that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated," and thus "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan*, *supra*, 508 U.S. at p. 278.)

In *Estelle v. Williams* (1976) 425 U.S. 501, 503, the United States Supreme Court explained that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." "[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial," and an instruction on the presumption of innocence is "one means of protecting the accused's constitutional right to be judged

solely on the basis of proof adduced at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 486 (*Taylor*).)

The Supreme Court has also explained, however, that "the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor*[, *supra*, 436 U.S. 478], such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial." (*Kentucky v. Whorton* (1979) 441 U.S. 786, 789.)

In *Sullivan*, the high federal court held that a constitutionally deficient reasonable doubt instruction deprives the accused of his or her federal constitutional right to a jury verdict of guilty beyond a reasonable doubt and is a reversible-per-se "structural error" that is not amenable to harmless error analysis and will always invalidate a conviction. (*Sullivan*, *supra*, 508 U.S. at pp. 277-278.)[8] The *Sullivan* court explained that, "[t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." (*Id*. at p. 280.)

---

8 In *Sullivan*, the Supreme Court concluded that, "[i]n his instructions to the jury, the trial judge gave a definition of 'reasonable doubt' that was . . . essentially identical to the one held unconstitutional in *Cage v. Louisiana* [(1990)] 498 U.S. 39." (*Sullivan*, *supra*, 508 U.S. at p. 277.) The high federal court referred to the *Sullivan* instruction as a "constitutionally deficient reasonable-doubt instruction." (*Id*. at p. 276.) "The *Sullivan* instruction was deficient in its definition of reasonable doubt; it spoke of 'grave uncertainty' and 'substantial doubt.' " (*People v. Crawford* (1997) 58 Cal.App.4th 815, 821, fn. 4.)

Where, however, the trial court has not included in its predeliberation charge to the jury an instruction on the presumption of the defendant's innocence and the prosecution's burden of proving the defendant's guilt beyond a reasonable doubt (with, e.g., CALCRIM No. 220 or CALJIC No. 2.90), but has otherwise told the jury that the prosecution must prove its case beyond a reasonable doubt and has not given an erroneous definition of that burden of proof, any constitutional error in failing to give such an instruction is reviewed under the harmless error standard announced in *Chapman, supra*, 386 U.S. at page 24. (*Vann, supra*, 12 Cal.3d at pp. 227-228; *People v. Flores* (2007) 147 Cal.App.4th 199, 210-211 (*Flores*); *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1219-1220 (*Elguera*).) Under the *Chapman* harmless-beyond-a-reasonable-doubt standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; see *Chapman, supra*, 386 U.S. at p. 24.)

C. *Analysis*

1. *The court committed federal constitutional error*

The first issue we must decide is whether the court's failure, following the close of evidence, to give in its predeliberation charge to the jury an instruction on the presumption of defendants' innocence and the People's burden of proving its case beyond a reasonable doubt (with, e.g., CALCRIM No. 220 or CALJIC No. 2.90) constitutes federal constitutional error in violation of the defendants' Sixth Amendment right to a jury verdict of guilty beyond a reasonable doubt. We conclude it does.

This case is similar to others in which California appellate courts have determined a trial court's failure to include such an instruction in its charge to the jury to be federal constitutional error despite repeated and correct references to the People's burden and the beyond-a-reasonable-doubt standard of proof during the jury selection process and in other instructions requiring particularized application of those principles. In *Vann*, for example, the California Supreme Court concluded the trial court committed federal constitutional error by failing to sua sponte include in its charge to the jury an instruction on the presumption of the defendants' innocence and the prosecution's burden of proving their guilt beyond a reasonable doubt. (*Vann*, *supra*, 12 Cal.3d at pp. 225-226, 227-228.) There, the trial court told the jury panel during the jury selection process that it would be "incumbent . . . upon the People to prove the allegations as to each defendant, and to prove them beyond a reasonable doubt, to a moral certainty, before you would be entitled to return a guilty verdict." (*Id*. at p. 227, fn. 6.) The trial court did not give its final instructions to the jury until 16 days later, at which time it did not refer back to its preliminary remarks during jury selection regarding the burden and standard of proof. It stated, "[I]t is my duty to instruct you on the law that applies to this case, and you must follow the law as I state it to you." (*Ibid*.) Noting that "[i]n net effect the jurors were given to understand that they had received a self-contained, complete statement of the law they were to follow," *Vann* held that the trial court's instruction regarding the reasonable doubt standard of proof that it gave jury panel members during jury selection was insufficient to cure the court's instructional error. (*Ibid*.)

The *Vann* court rejected the People's contention that the jury was adequately instructed on the People's burden to prove the defendants guilty beyond a reasonable doubt because the trial court gave an instruction on circumstantial evidence telling the jurors they could not find defendants guilty " 'based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and *each fact which is essential to complete a set of circumstances necessary to establish a defendant's guilt has been proved beyond a reasonable doubt*.' " (*Vann, supra*, 12 Cal.3d at p. 226, italics added.) The Supreme Court stated that, "[a]lthough the foregoing instruction states, albeit indirectly, that an accused cannot be convicted on circumstantial evidence except where such evidence proves the issue beyond a reasonable doubt, it *fails to tell the jurors that a determination of guilt resting on direct testimony must also be resolved beyond a reasonable doubt*." (*Ibid*., italics added.) Noting that the prosecution's case depended in large part on *direct* evidence, the high court concluded that "[a]n instruction [requiring] proof beyond a reasonable doubt only as to *circumstantial* evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by *direct* evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is *direct* and thus of a higher quality." (*Id*. at pp. 226-227, italics added.)

The *Vann* court also rejected the People's contention that an instruction regarding character evidence was sufficient to inform the jurors of the reasonable doubt standard of proof. (*Vann, supra*, 12 Cal.3d at p. 227.) In that instruction, the trial court told the jury

that "evidence of good character may be sufficient to raise a *reasonable doubt whether a defendant is guilty*, which doubt otherwise would not exist." (*Ibid*., italics added.) Vann reasoned that, "[a]lthough the jury heard both favorable and adverse testimony regarding the character of the defendants, this instruction did not expressly tell them that a reasonable doubt based upon such testimony would necessitate acquittal nor did it assist them in evaluating issues or conflicts other than character." (*Ibid*.)

Referring to the foregoing instructions on circumstantial and character evidence, *Vann* concluded that "[t]he foregoing references to reasonable doubt *in isolated applications of that standard of proof* fall far short of apprising the jurors that defendants were entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt *buttressed by additional instructions on the meaning of that phrase*." (*Vann, supra,* 12 Cal.3d at p. 227, italics added, fn. omitted.)

Finally, the *Vann* court also concluded that, although the closing arguments of defendants' counsel advised the jurors that to find the defendants guilty they had to find the elements of the crimes were proved beyond a reasonable doubt, those closing arguments did not cure the court's instructional error. (*Vann, supra,* 12 Cal.3d at p. 227, fn. 6.) It reasoned that in its final charge to the jury, the trial court "made it clear that the jurors were to follow the law as explained by the court, and were not to follow rules of law stated in argument but omitted from the instructions." (*Ibid*.)

In *Flores, supra,* 147 Cal.App.4th 199, the court held that the trial court's failure to include CALJIC No. 2.90 or an equivalent reasonable doubt instruction in its predeliberation charge to the jury constituted federal constitutional error, even though (1)

the court had read CALJIC No. 2.90 six days earlier during the jury selection process to each prospective jury panel member who served on the jury, (2) the court gave reasonable doubt instructions in specific contexts, and (3) the prosecutor discussed the beyond-a-reasonable-doubt standard of proof in her closing argument. (*Flores* at pp. 215-218.)

We conclude that this case is closely analogous to *Vann*, *supra*, 12 Cal.3d 220, and *Flores*, *supra*, 147 Cal.App.4th 199, and because the trial court's instructions, considered individually and as a whole, did not adequately inform the jury that the prosecution had the burden to prove each element of the charged offense(s) beyond a reasonable doubt, the court committed federal constitutional error. The court's reading of a modified version of CALCRIM No. 220 to all of the jurors during the jury selection process was insufficient to comport with federal constitutional requirements. (*Vann, supra,* 12 Cal.3d at p. 227, fn. 6; *Flores*, *supra*, 147 Cal.App.4th at p. 215; *Elguera*, *supra*, 8 Cal.App.4th at pp. 1217-1218, 1221-1222.) The court's oral remarks were given to prospective jurors who at the time did not know whether they would ultimately serve in this case. "As a result, the members of the panel could well have viewed the court's remarks as hypothetical and thus have failed to give the instruction the same focused attention they would have had they been impaneled and sworn." (*Elguera*, *supra*, 8 Cal.App.4th at p. 1222.)

Furthermore, as previously noted, the court instructed the jury during its predeliberation charge with CALCRIM No. 200 that it would "*now* instruct . . . on the law that applies to this case," it would "give . . . a copy of the instructions to use in the

jury room," the jury "must follow the law *as I explain it to you*," and "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." However, the predeliberation instructions did not include CALCRIM No. 220, CALJIC No. 2.90, or another instruction on the presumption of innocence and the People's burden of proving guilt beyond a reasonable doubt, nor did they refer to or otherwise incorporate the modified version of CALCRIM No. 220 the court read during jury selection.

We note that whereas the trial court in *Vann* gave the final jury instructions 16 days after it spoke to the prospective jurors about the People's burden of proof during jury selection (*Vann*, *supra*, 12 Cal.3d at p. 227, fn. 6), and the trial court in *Flores* gave the final jury instructions eight days after it read the modified version of CALCRIM No. 220 to the prospective jurors during jury selection, the trial court here gave its final jury instructions on October 23, a full three weeks after it gave that instruction to the first panel of prospective jurors on October 2, and 12 days after it gave that instruction to the second panel of prospective jurors on October 11.

We presume the jury reasonably inferred that all of the instructions on the law they were to apply to the facts in this case were given to them during the court's predeliberation instructions. We find apropos here our observation in *Flores* that "it is unreasonable to expect prospective jurors, who have yet to be empanelled and sworn as actual jurors in the trial, to give the necessary attention and weight to instructions given by a trial court during jury selection as the federal constitution requires." (*Flores, supra,* 147 Cal.App.4th at p. 215.)

Similarly, the three limiting instructions the court gave to the jury during the People's case-in-chief on October 17 and 19 were insufficient to cure the court's erroneous failure to include CALCRIM No. 220, CALJIC No. 2.90, or an equivalent instruction during its charge to the jury. Those limiting instructions were given in specific contexts and pertained to the jury's consideration of evidence the prosecution had presented showing that (1) Ortega had committed uncharged offenses of unlawfully possessing a weapon and a stolen vehicle, (2) that Luera had committed the uncharged offenses of robbery and carjacking, and (3) that Carrillo had committed the uncharged offense of carjacking. As this court stated in *Flores*, "We cannot presume that a reasonable doubt instruction given in a *specific* context . . . will necessarily be understood by all of the jurors to apply *generally* to their determination of the defendant's guilt on the charged offenses." (*Flores, supra,* 147 Cal.App.4th at p. 216; see also *Vann*, *supra*, 12 Cal.3d at p. 227 ["references to reasonable doubt in isolated applications of that standard of proof fall far short of apprising the jurors that defendants were entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt buttressed by additional instructions on the meaning of that phrase"].)

The court's predeliberation instructions on circumstantial evidence (CALCRIM Nos. 224 and 225) were also insufficient to cure the court's erroneous failure to include CALCRIM No. 220, CALJIC No. 2.90, or an equivalent instruction during its charge to the jury, even though each instructed the jury that "[b]efore you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that *the People have proved each fact essential to*

that conclusion beyond a reasonable doubt." (Italics added.) Cases involving the giving of similar instructions have concluded that such instructions are insufficient to comport with federal constitutional requirements, especially where (as here) the challenged convictions are based in part on direct evidence. (*Vann*, *supra*, 12 Cal.3d at pp. 226-227; *Flores*, *supra*, 147 Cal.App.4th at pp. 215-216; *Elguera*, *supra*, 8 Cal.App.4th at p. 1218.)

The remaining predeliberation instructions that referred to the People's burden and the beyond-a-reasonable-doubt standard of proof[9] were also insufficient to cure the court's erroneous failure to include CALCRIM No. 220, CALJIC No. 2.90, or an equivalent instruction during its charge to the jury because those instructions were given in specific contexts or pertained to particular allegations. (*Vann*, *supra*, 12 Cal.3d at p. 227 ["references to reasonable doubt in isolated applications of that standard of proof fall far short of apprising the jurors that defendants were entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt buttressed by additional instructions on the meaning of that phrase"]; *Flores*, *supra*, 147 Cal.App.4th at p. 216.)

Finally, although all counsel referred to the reasonable doubt standard of proof during their closing arguments, cases involving that circumstance have concluded such

---

9 CALCRIM Nos. 315 (eyewitness identification), 359 (corpus delicti rule), 375 (evidence of uncharged offenses), 2542 (active participation in a criminal street gang), 2545 (not registered firearm owner), 601 (attempted murder: deliberation and premeditation), 3148 (personal and intentional discharge of a firearm), and 1401 (felony committed for benefit of criminal street gang).

closing argument is insufficient to comport with federal constitutional requirements. (*Vann*, *supra*, 12 Cal.3d at p. 227, fn. 6; *Flores*, *supra*, 147 Cal.App.4th at pp. 217-218; *Elguera*, *supra*, 8 Cal.App.4th at pp. 1221-1222.)

In sum, we conclude the court committed federal constitutional error by failing to sua sponte give CALCRIM No. 220, CALJIC No. 2.90, or an equivalent instruction in its final predeliberation charge to the jury. (*Sullivan*, *supra*, 508 U.S. at pp. 277-278; *Vann*, *supra*, 12 Cal.3d at pp. 227-228; *Flores*, *supra*, 147 Cal.App.4th at p. 219.)

2. *Applicability of the Chapman harmless error standard*

The next issue we must decide is whether we must treat the court's federal constitutional error in failing to sua sponte give an instruction on the presumption of innocence and the People's burden of proving guilt beyond a reasonable doubt in its charge to the jury as structural error that is reversible per se under *Sullivan*, *supra*, 508 U.S. 275, or whether it should be reviewed under the harmless error standard in *Chapman*, *supra*, 386 U.S. 18. We conclude the *Chapman* standard should be applied in this case.

As already noted, *Sullivan* involved an *erroneous* instruction on reasonable doubt. As we observed in *Flores*, "the jurors there were *misdirected or misinformed* as to the proper standard of proof." (*Flores*, *supra*, 147 Cal.App.4th at p. 211, italics added.)

Here, much like in *Vann*, *supra*, 12 Cal.3d 220, and *Flores*, *supra*, 147 Cal.App.4th 199, the jurors were *not* misdirected or misinformed with an erroneous instruction on the People's beyond-a-reasonable-doubt burden of proof; the court told the jury about the People's burden of proof and the beyond-a-reasonable-doubt standard of

proof during the jury selection process. The instructions the court gave at the conclusion of the case reminded the jurors that the elements of the charged offenses had to be proved beyond a reasonable doubt, and all of the attorneys during closing arguments referred to the prosecution's burden to prove its case beyond a reasonable doubt. Thus, this case, like *Vann* and *Flores*, is markedly different from one, like *Sullivan*, *supra*, 508 U.S. 275, in which the jurors are misdirected or misinformed as to the proper burden and standard of proof.

We thus conclude, as did the majority in *Flores*, *supra*, 147 Cal.App.4th at page 211, that at least in a case where, as here, the trial court has told the jurors the prosecution must prove its case beyond a reasonable doubt and has not given an erroneous instruction on the People's burden of proof, the harmless error standard applied by our Supreme Court in *Vann*, *supra*, 12 Cal.3d 220, remains the governing law. We are bound to follow the decision of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we must review the court's federal constitutional error under the *Chapman* harmless error standard.

3. *The federal constitutional error was not harmless beyond a reasonable doubt*

In *Vann*, *supra*, 12 Cal.3d at page 227, our high state court emphasized that " '[n]o instruction could be more vital' " than an instruction of the presumption of innocence and the People's burden of proving guilt beyond a reasonable doubt, because in every criminal case it directs the jurors " 'to put away from their minds [*sic*] all suspicions arising from arrest, indictment, arraignment, and the appearance of the accused before them in his role as a defendant.' "

Here, on a review of the entire record, we cannot say the trial court's error was harmless beyond a reasonable doubt. The court gave a modified version of CALCRIM No. 220 to all of the prospective jurors during the jury selection process, but it did not give that instruction (or an equivalent instruction) when it gave the predeliberation instructions to the jury three weeks after it gave the modified version of CALCRIM No. 220 to the first panel of prospective jurors. In its charge to the jury, the court made no reference to the presumption of innocence; its references to the beyond-a-reasonable-doubt standard of proof pertained to specific contexts or particular allegations; and it did not provide, in either the oral or written charge, any definition of reasonable doubt. In the absence of a clear, *general* instruction on the presumption of innocence and the People's burden of proving guilt beyond a reasonable doubt, we cannot conclude that the omission of such a vital instruction was harmless beyond a reasonable doubt.

DISPOSITION

The judgments are reversed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.